(10)

No. 90-681

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BARBARA HAFER,

Petitioner,

against

JAMES C. MELO and CARL GURLEY, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF KENNETH W. FULTZ AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Cletus P. Lyman
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

Counsel of Record for
Amicus Curiae

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Kenneth W. Fultz respectfully moves the court, pursuant to Rule 37.4, R.S.Ct., for leave to file the accompanying brief amicus curiae in support of respondents. Respondents have consented to the filing of the brief.

Petitioner has refused consent.

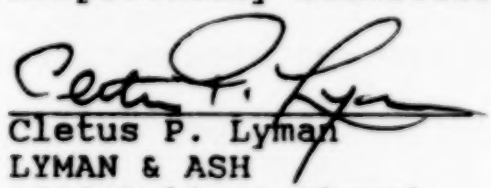
Mr. Fultz is an individual who was terminated from his position as Park Superintendent 4, Bureau of Parks, Department of Environmental Resources, Commonwealth of Pennsylvania, on April 20, 1988. Gregg E. Robertson, Deputy Secretary of Environmental Resources, Commonwealth of Pennsylvania, acting on behalf of Arthur W. Davis, Secretary, made the decision to terminate him, with the participation of William C. Forrey, director of state parks.

On April 19, 1990, Mr. Fultz brought an action seeking back pay and other damages to be paid personally by Messrs. Davis, Forrey and Robertson, under 42 U.S.C., Section 1983. Fultz v. Davis et al., M.D.Pa. Civ. Act. No. 90-0779, appeal pending, 3d Cir. No. 90-6039.

Fultz alleges that he was terminated in violation of due process guaranteed by the Fourteenth Amendment because he was deprived of a pretermination hearing required by Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985).

Because the Commonwealth is immune from back pay and damages awards under the Eleventh Amendment, Fultz like respondents must look to officials responsible for his termination for compensation. The court's decision here will likely control the outcome of Fultz v. Davis as to back pay and damages.

Respectfully submitted,



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QUESTIONS PRESENTED

1. Is the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, not a "person" under the Civil Rights Act, 42 U.S.C. Section 1983, and therefore not subject to civil damage actions instituted under that statute on behalf of former employees of the Pennsylvania Department of the Auditor General arising out of the Auditor General's termination of their employments?

2. Is not the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, entitled to the absolute immunity of the Eleventh Amendment to the Constitution of the United States from civil damage actions in the federal

courts instituted on behalf of former employees of the Pennsylvania Department of Auditor General arising out of the Auditor General's termination of their employments?

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INTEREST OF THE AMICUS CURIAE

The interest of the amicus is set forth in a motion which precedes this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner argues that a footnote in a 1989 decision of this court overrules the seminal case in the area of official liability for deprivation of Constitutional rights.

This court should reaffirm its 17 year old precedent, which is stare decisis and correctly decided. The precedent is part of the fabric of jurisprudence of official immunity, which accords absolute immunity for all official acts to the president of the United States, absolute immunity to certain officials in exercise of certain functions, and qualified immunity to all but the president in administrative functions such as employment decisions.

ARGUMENT

1. The Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, is a "person" under the Civil Rights Act, 42 U.S.C. Section 1983, and is subject to civil damage action instituted under the statute on behalf of former employees of the Pennsylvania Department of the Auditor General, arising out of the Auditor General's termination of their employments.

The above question and the question that follows have previously been decided by this court. Scheuer v. Rhodes, 416 U.S. 232 (1974). Certiorari was improvidently granted in this case in that neither the petition for the writ nor the brief in opposition filed by respondents cited Scheuer.

The complaints in Scheuer alleged that the governor of Ohio, the adjutant general of the Ohio National Guard and various other state officials, in deploying the Ohio National Guard on the

Kent State campus, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office. 416 U.S. at 235.

Scheuer unanimously held [Douglas, J., taking no part] that state officials were subject to suit under Section 1983 "in their persons."

2. The Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, is not entitled to the absolute immunity of the Eleventh Amendment to the Constitution of the United States from civil damage actions in the federal courts instituted on behalf of former employees of the Pennsylvania Department of Auditor General arising out of the Auditor General's termination of their employments.

Scheuer, supra, also held that since Ex parte Young, 209 U.S. 123 (1908), it

has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under color of state law. 416 U.S. 237.

Scheuer said that Ex parte Young teaches that, when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States [the court's emphasis]."

Scheuer held that state officials

are entitled to qualified immunity for official actions. 416 U.S. 247. Such immunity depends on the belief of the official formed at the time and in light of the circumstances. 416 U.S. 247-248.

Official immunity is the same for state and federal officials and school board members. Butz v. Econonou, 438 U.S. 478, 506-508 (1978)(federal officials governed by Scheuer); Wood v. Strickland, 420 U.S. 308, 319 (1975)(school board members governed by Scheuer). Only the president of the United States has absolute immunity for all official acts. Nixon v. Fitzgerald, 457 U.S. 731 (1982). Some officials have functional absolute immunity, for examples, judges in their adjudicatory functions, legislators in the legislative functions, and prosecutors in their

prosecutorial functions. Imbler v. Pachtman, 424 U.S. 409, 430 (1976). But, no official other than the president of the United States has absolute immunity in administrative functions.

The function of employer has twice been recognized as the type of administrative function not entitled to absolute immunity. A state judge in his function of employer has only qualified immunity. Forester v. White, 484 U.S. 219 (1988). Likewise, a member of Congress may be sued as an employer. Davis v. Passman, 442 U.S. 228 (1979).

Harlow v. Fitzgerald, 457 U.S. 800 (1982), held that officials entitled to qualified immunity must demonstrate that they did not violate clearly established constitutional rights of which a reasonable person would have known.

Scheuer has been followed and cited with approval through 1990 (after Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), relied upon by petitioner). Howlett By and Through Howlett v. Rose, -- U.S. --, 110 S. Ct. 2430, 2447 (1990); Forester v. White, supra, 484 U.S. at 224; Cleavinger v. Saxner, 474 U.S. 193 (1985); Papasian v. Allen, 478 U.S. 265, 278 (note 11) (1986); Butz, supra, Wood, supra.

This court has also established standards for award of punitive damages against state officials under Section 1983. Smith v. Wade, 461 U.S. 30 (1983).

Petitioner's brief on the merits also fails to cite Scheuer. Had petitioner cited Scheuer, she might have argued either (1) that Scheuer was overruled sub silentio by Will, or, (2)

that the court should overrule Scheuer.

The first argument is improbable in that this court would not overrule the seminal case in the area of official liability in a footnote; the footnote borders on dicta; and, Scheuer was cited as good law in Howlett.

Scheuer should not be overruled now because it was correctly decided, it is stare decisis, officials of federal, state and local governments are treated the same, and Scheuer is essential to remedy constitutional violations. This is particularly true where a state is involved because an individual deprived of a constitutional right by a state official has no damages remedy against the state.

The qualified immunity provided by Scheuer, as elaborated and enhanced in

Harlow, sufficiently safeguards the interest of the state and its officials in avoiding liability for actions taken when constitutional rights are unclear.

Davis, supra, 442 U.S. at 245-249, considered and rejected the policy arguments advanced by petitioner. Davis held, at 246, that legislators, when not shielded by the Speech or Debate Clause, ought generally to be bound by the law as are ordinary persons. Quoting Butz, supra, the court said:

> "'Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
> "'"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." United States v. Lee, 106 U.S. [196,] 220 [(1882)].' 438 U.S., at 506."

Davis was cited with approval in Forester, supra, 484 U.S. at 229-230.

Scheuer has been the law for 17 years, and should not be overruled by this court because Congress has not overruled Scheuer by amendment of Section 1983. In 1976, Congress amended Section 1983 by adding a remedy of attorneys fees. Pub. L. 94-559, Section 2, 90 Stat. 2641, 42 U.S.C., Section 1988 (October 19, 1976). The legislative history of the 1976 Amendment evinces a strong Congressional desire for effective remedies for Section 1983 violations. Hutto v. Finney, 437 U.S. 678 (1978).

This court should decline the invitation of petitioner (petition for certiorari, at 12), to use this case to explore "the extent of state officials' immunity" because this case offers no

basis on which to expound qualified immunity beyond the standards of Harlow.

These cases were dismissed by the district court, and so treated by the court of appeals. Accordingly, there was no development of the qualified immunity issue below.

3. The court should not review the question presented by amicus curiae State and Local Legal Center.

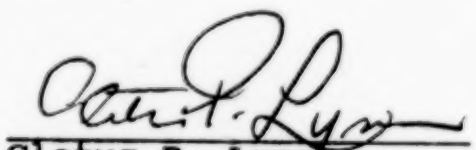
State and Local Legal Center moves to raise a pleading question, whether a government official may be sued for damages when the compliant fails to identify the capacity, official or personal, in which the official is sued.

Review of this issue should be denied because the court did not grant review of it. Moreover, the issue is academic in a case against state

officials because state officials cannot be sued for damages in their official capacities. Accordingly, any claim for damages must be construed as seeking damages against them personally.

Conclusion

WHEREFORE, the grant of certiorari should be vacated as improvident and the petition for a writ of certiorari should be denied, or, in the alternative, the judgment of the court of appeals should be affirmed.



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